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No. 94-691

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JAY GREGORY, Sheriff of Patrick County, Virginia,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,

Third Party Defendant-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly held that adding the Board as a third-party defendant violated the fundamental fairness that characterizes our judicial system since the Board did not have notice and an opportunity to participate in the determination of liability?

2. Whether this Court should decline plenary review since there is no conflict among the circuit courts of appeal and the underlying facts are so unique that any decision would provide little guidance to the lower federal courts?

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STATEMENT OF THE CASE

This case arises from an action brought by the United States Department of Justice ("DOJ") on behalf of female job applicants for deputy sheriff positions in Patrick County, Virginia. On June 29, 1983, DOJ filed an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") against Patrick County Sheriff, Jesse W. Williams. *U.S. v. Gregory*, 582 F.Supp. 1319 (W.D.

Va. 1984). DOJ did not assert that Williams was personally liable. Indeed, DOJ was looking to the Patrick County's Sheriff's Department to satisfy any judgment it obtained.

After suit was filed, but prior to trial, Jay Gregory was elected sheriff. Gregory, as the executive head of the sheriff's department, hired or rehired deputies for the Patrick County Sheriff's Department.[1] Gregory did not employ any female deputies. DOJ alleged that Gregory thereby continued a pattern of discrimination against women. DOJ dismissed Williams as a defendant and substituted Gregory. DOJ never determined that Williams did not discriminate against women – indeed, its theory was always that Gregory continued Williams' discriminatory practices. *U.S. v. Gregory,* 871 F.2d 1247 (4th Cir. 1989).

Prior to trial DOJ deposed Charles K. Trible, a member of the Compensation Board of Virginia (the "Board"). The Board is a state agency that allocates state support among Virginia's elected local officers.[2] Each year the Board reviews data concerning each sheriff's statutory duties. The Board then allocates the General Assembly's lump-sum appropriation for sheriffs to each locality based on population and workload. For present purposes the Board's allocation takes the form of reimbursing localities for the salaries of the number of deputies

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[1] The Board plays no role in the selection of deputies.

[2] Under Art. VII, § 4 of the Virginia Constitution such officers, including sheriffs, serve independent of state government. 1986-87 Va. Att'y Gen. Ann. Rep. 69.

needed to perform the statutorily assigned tasks.[3] As DOJ acknowledged, the Board does not approve, or participate in, the selection of the individuals to fill any deputy position. Moreover, DOJ learned that under Virginia's scheme of independent constitutional officers, the Board is not obligated to pay any obligation not contained in an approved budget.[4] DOJ understood that the Board exercises no control over the day-to-day operations of a sheriff's office.

Although DOJ moved to join the Board as an additional defendant on the final day of trial, it argued that

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[3] This fulfills the state's obligation to a sheriff and there is no claim that the Board did not fully fund the approved budget in any year for which relief was ordered. Thus, any payments by the board would not be used for state mandated duties such as service, prisoner transports or courtroom security. Under Virginia law, absent the Board's agreement to fund additional tasks, they are the locality's responsibility. DOJ understood that and indicated that it did not seek recovery from the Board.

[4] Under Virginia law the sheriff or the locality determine if the exigencies of operating the sheriff's office require hiring additional deputies to provide services not funded by the Board. If so, either may appeal the Board approved budget to a three judge court. Va. Code § 14.1-52. If circumstances arise after the budget is approved that require additional state support, sheriffs may seek relief under Va. Code § 14.1-142. Absent an order for state aid under either statute, however, the sheriff or locality pay for items not in the approved budget. *See* § 1-26, Item 69B, 1992 & 1993 Va. App. Acts; Va. Code §§ 15.1-137.3 & 14.1-170. As DOJ noted at trial, absent approval under either statute, Virginia law does not require the Board to pay such costs.

joinder was not necessary.[5] The timing of the motion bothered the district court. The judged noted, "I'm troubled about how I could add these parties without retrying the whole case." DOJ did not press the joinder motion and the district court did not rule on it before initially deciding the case on March 24, 1984. The Board was never served with process and DOJ never took any further action to formally bring the Board into the suit.

After trial Gregory moved for a directed verdict, arguing, as he had in motions to dismiss and for summary judgment, that deputies were within a Title VII exception for the personal staff of an elected official. The district court agreed. The Fourth Circuit vacated and remanded for reconsideration, and ultimately reversed on that issue. *U.S. v. Gregory*, 818 F.2d 1114 (4th Cir. 1987).[6] The district court then found that there was no discrimination. The court of appeals again reversed and remanded for a determination of remedies. *U.S. v. Gregory*, 871 F.2d 1239, 1240 (4th Cir. 1989).

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[5] Although the record is not entirely clear, apparently DOJ's motion was in response to Gregory's Motion to Dismiss for Failure to Add Indispensable Parties.

[6] After the initial reversal, the parties disputed whether the Fourth Circuit resolved the indispensable party issue. Gregory stated: "if the Commonwealth . . . is going to have to pay the tab, are they . . . entitled to or is it mandated that they be joined, because they are represented by the Attorney General's Office, and at this stage of the game the door is basically closed to them." That was on February 5, 1988, more than four years after trial and more than four years before the Board was added "to pay the tab."

On July 12, 1990, Gregory filed a motion to add the Board as a third-party defendant. On May 14, 1991, the district court denied Gregory's 1990 motion and DOJ's 1984 joinder motion. The district judge did not mention having to retry the case but noted, "the proper procedure would be to proceed with [Gregory] . . . as the sole defendant and render judgment as is appropriate . . . [DOJ] may then use the processes of [the district court] to effect collection of any amounts due to [DOJ]."

On March 25, 1992, the district court entered a decision providing for injunctive relief and monetary awards for two women against whom the sheriffs discriminated. On April 23, 1992, the court set the monetary awards. On June 19, 1992, the court enjoined further discrimination by Gregory. On September 11, 1992, Gregory again moved to add the Board as a third-party defendant. On December 2, 1992, the district court added the Board and simultaneously entered judgment against it.[7] The Board appealed. The Fourth Circuit reversed, holding that the Board did not receive proper notice of potential liability for any discrimination.

REASONS FOR DENYING THE WRIT

I. The Decision Below Was Correct.

A. Adding The Board Was Not Fair.

Fundamental fairness requires that parties to judicial proceedings have a meaningful opportunity to participate

[7] Only the judgment for damages was entered against the Board. The injunction is directed to the sheriff, not to the Board.

in the adjudication of the critical allegations of the dispute. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992) (when intervention granted on the eve of trial, refusal to allow discovery denied intervenors a meaningful opportunity to participate in the resolution of the merits). *See also Bankers Trust Co. v. Bethlehem Steel Corp.*, 752 F.2d 874, 890 (3d Cir. 1985) (parties must have notice and the opportunity to present evidence on the contested facts). Stated another way, the fundamental fairness that characterizes our judicial system precludes binding a party by a decision without allowing that party to represent its own interests in the fact finding process. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 313 (1950) (entity whose interests are subject to diminution not required to allow others, who may conduct a less than adequate defense, to represent its interests). Indeed, "[t]he opportunity to be heard, an essential feature of [our judicial system], is meaningless when afforded only *ex post facto*." *VEPCO v. SCC*, 226 Va. 541, 548, 312 S.E.2d 25, 29 (1984).[8]

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[8] While the Fifth Amendment often does not protect states, this case is an exception. The elastic nature of due process led this Court to conclude that, despite the literal language of the takings clause, localities are protected by the Fifth Amendment. *U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 n15 (1984). Similarly, the Third Circuit has suggested that a state, as a property owner, enjoys protection against takings without due process. *Pennsylvania v. Porter*, 659 F.3d 306, 314 n9 (1981). But even if the Board does not have constitutional rights here, it was still entitled to the basic justice guaranteed all litigants under our judicial scheme. *U.S. v. Cardinal Mine Supply*, 916 F.2d 1087, 1090 (6th Cir. 1990) (the principle that a reasonable opportunity to be heard must precede any judicial determination of rights extends beyond any limitations of the due process clause). Under

Here, DOJ never served the Board with process. Thus, the Board had neither reasonable notice of potential liability nor a reasonable opportunity to participate in the determination of liability. DOJ did not file its motion to add the Board until the last day of trial, although it deposed a Board member three months earlier. Nor did Gregory make any real effort to add the Board as a party prior to trial. The Fourth Circuit's determination of discrimination and the district court's decision on remedies both predated the order adding the Board for the sole purpose of paying damages. Yet no one has ever contended that the Board participated in the discrimination. Thus this case, as the parties chose to litigate it and the district court chose to resolve it, did not give the Board either the opportunity to protect its interests at trial or the opportunity to contest the determination of the damage awards that the district court ordered it to satisfy. It is difficult to imagine a more blatant disregard for the fundamental fairness that our judicial system guarantees.[9]

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analogous facts this Court held "one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . a court has no power to adjudicate a personal . . . obligation unless it has jurisdiction over the . . . defendant . . . [h]ere, Hazeltine was not named as a party, was never served and did not formally appear at trial." *Zenith Radio v. Hazeltine Research*, 395 U.S. 100, 110 (1969). That forecloses any claim that the Board had notice.

[9] When the district court noted its concerns about adding the Board after trial DOJ suggested deposing Trible afforded the Board sufficient notice. Gregory makes a similar claim in the petition. That argument fails under *Hazeltine Research*. There the parties stipulated that Hazeltine Research and its parent, Hazeltine Corp., would be considered the same party for

B. Adding The Board Was Improper Procedure.

1. DOJ first moved to add the Board on the last day of trial. By then, as the district court realized, the critical proceedings were complete. Yet the issues concerning joinder remained unresolved for more than seven years. In the interim the parties appealed and cross-appealed various issues to the Fourth Circuit three times. 871 F.2d 1240. After the remand for a determination of remedies, Gregory converted his dismissal for failure to add an indispensable party argument into an attempt to add the Board. An alleged inability to satisfy the judgment was the stated reason for Gregory's joinder motions.[10] There was still no claim, nor anything in the record to suggest, that the Board played any role in the discrimination. Nevertheless, the district court ruled that since the case, as the parties framed it after ten years of litigation, would not provide adequate remedies if the Board was not added, joinder was proper. The district court was wrong.

Here joinder is controlled by Federal Rules 15 and 19. While Gregory claims that complete relief cannot be

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purposes of that suit. The trial court relied on the stipulation in entering judgment against the parent even though it was not a named party, was never served and did not appear at trial. This Court disagreed noting that although the stipulation was signed by an officer of the parent, he was acting only on the behalf of the subsidiary. Thus, knowledge of a claim is not enough. Since the Board was not served and did not appear at trial, it is not liable.

[10] Contrary to Gregory's claims, the record does not establish that the sheriff has no assets. Indeed, DOJ learned that the sheriff received federal grants. There is no indication, however, whether DOJ explored claiming an offset against those grants.

granted without adding the Board, that does not justify adding the Board after liability was determined. If Gregory is correct, Rule 19 required joinder prior to trial. *Underwood v. Maloney,* 256 F.2d 334, 338 (3d Cir. 1958) (only party capable of providing relief is indispensable). Rule 19 recognizes the need to protect absent persons from the prejudicial consequences of deciding a case without them. *Black Diamond Girl Scouts v. St. Paul Fire & Marine,* 621 F.Supp. 96, 97 (D.W.Va. 1985). The Board reasonably relied on its non-party status. It should not be prejudiced by the parties' self-serving change of heart after a determination of liability. *See CP Nat'l Corp. v. Bonneville Power,* 928 F.2d 905, 912 (9th Cir. 1991) (joinder may be considered anytime but is only proper if no prejudice results).

2. Claims against the Board are time barred. Claimants filed their discrimination charge on July 30, 1980. 871 F.2d 1240 n1. DOJ filed its official capacity suit on June 29, 1983. Gregory did not move to add the Board until July 12, 1990. The limitations period had expired by then (claims against states must be filed within 30 days of EEOC determination). 42 U.S.C. § 2000e-5(e) & (f)(1). Nor was there a reason to toll the statute.

One who does not contribute to or bring about delay is "entitled to rely on [the]statute of limitations and the policies of fairness and repose that it embodies." *Franklin v. Herbert Lehman College,* 508 F.Supp. 945, 952 (S.D.N.Y. 1981). A statute of limitations will not be tolled "under circumstances that would seriously prejudice a [putative] defendant who is not responsible for the delay." *Id.* at 951. Rule 15(c) prescribes when a pleading that changes the party against whom relief is sought relates back to the

original pleading. The three pronged test concerns whether: (1) the claim arose out of the same conduct; (2) the new party received such notice that it will not be prejudiced; and (3) the new party knew that the claim would have been made against it except for a mistake in identifying the proper party. None of those prongs are met here.

First, the claim against the Board does not arise out of the same conduct because the Board did not participate in any discrimination. Nor was there misidentification. DOJ understood that the Board and the sheriff were separate entities and deposed both of them. Nothing during Trible's deposition, the Board's only involvement in the case, suggested that Gregory would resurrect the joinder issue after liability was determined. It is difficult to conceive of circumstances more prejudicial than joining a party more than ten years after the discrimination, after determining the liability of others and merely to satisfy a judgment.[11] The Board was denied the opportunity to participate in the determination of liability, to

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[11] As the court of appeals implicitly recognized, Gregory's reference to the Ressell claim disregards the prohibition against considering efforts to resolve disputes as evidence of liability. F.R. Evid. 408. When the Board reimbursed the county for the settlement of Ressell's claim the Board was not a party to this suit and it appeared that such action might resolve the case (*i.e.*, no court had found that the sheriff discriminated against women). Such a payment should be deemed a settlement effort, not evidence of liability. Also inconclusive is the reimbursement of attorney's fees. The Board did not have the opportunity to participate in the *ex parte* hearings through which Gregory obtained those payments. Indeed, the state court had no jurisdiction over that matter and the orders for those payments were void. The Board's failure to consult with counsel before

present its defense theories and to represent its interests at trial. In such circumstances the court of appeals correctly refused to countenance the untimely claims against the Board.

C. Relief Not Warranted Against The Board.

Employers who violate Title VII have no right to contribution from third parties even if those third parties share some responsibility for the discrimination. *Northwest Airlines v. Transport Workers,* 451 U.S. 77 (1981). If the sheriff would not be entitled to contribution from a co-wrongdoer, it is inconceivable that he should be entitled to indemnification from an innocent third party that did not condone or participate in the discrimination. That lack of culpability controls this case.

In official capacity suits, governmental entities are liable only if they are the "moving force" behind the discrimination. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). Stated another way, the Board could be liable only if its policy played a part in violating federal law. *Id.* Since the Board takes no part in the selection of deputies and has no policy condoning discrimination, it cannot be liable.

Gregory's contentions to the contrary notwithstanding, sheriffs are independent constitutional officers; they are not state officials. *Sherman v. City of Richmond,* 543 F.Supp. 447, 449 (E.D.Va. 1982); *May v. Newhart,* 822

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honoring what on its face appeared to be a valid court order, should not be held against it.

F.Supp. 1233, 1236 (E.D.Va. 1993); *Olivo v. Mapp*, 838 F.Supp. 259, 261 (E.D.Va. 1993). Unless expressly provided by statute, the state exercises no control over the day-to-day operations of the sheriff's office. When the discrimination occurred, Virginia law addressed only the minimum qualifications for deputy sheriffs. No statute guided a sheriff's final selection of deputies from the qualified applicants. Moreover, the Board merely told each sheriff how many deputy positions the state would fund. The Board did not participate in the selection of any deputy. Simply put, the Board was not the moving force behind the decision not to hire women. Nor has DOJ ever alleged that any policy or custom of the Board played a part in the discrimination. Thus, in this official capacity suit the Board is not liable under *Kentucky v. Graham.*

II. This Case Does Not Warrant Review By This Court.

The court of appeals reversed on a simple tenent of due process – litigants who are not given notice and the opportunity to participate in the determination of liability cannot be held responsible for damages. That holding does not conflict with any decision of this Court or any decision of the various courts of appeals. Thus, the petition does not present an opportunity to resolve any conflict within the judicial system. From that perspective, this case does not warrant review by this Court.

Moreover, the facts in this case are so unique that resolving the underlying conflict will not provide any appreciable guidance in other factual settings. Virginia's system of independent constitutional officers is unique. *Jenkins v. Weatherholtz*, 719 F.Supp. 468, 469 (W.D.Va.

1989). Thus, reviewing this case and addressing the issues concerning a state or local government's responsibility for the payment of Title VII damages under these unique circumstances, will not provide significant guidance for the federal judiciary. Similarly, the procedural issues are not likely to recur – there simply are not that many cases that are appealed to courts of appeals four times while joinder issues remain unresolved. Stated another way, this case does not afford the Court an opportunity to accomplish its goal of providing guidance within the federal judicial system, and the petition should be denied for that reason alone.

III. CONCLUSION

Under the instant facts, the Board was not treated fairly. DOJ's actions at trial suggested it would not hold the Board responsible for any potential liability. Indeed, it was only after liability was established that Gregory moved to add the Board. Thus, the Board had no reasonable opportunity to protect its interests. Moreover, because of the delay in adding the Board, it was procedurally improper to do so. First, the statute of limitations had run on any claim against the Board. Alternatively, fundamental fairness precludes leading the Board to believe it would not be involved until after trial and a determination of liability and then holding the Board responsible for discrimination that it neither controlled nor condoned. Indeed, since the sheriff acted completely independent of the Board, there is no basis for

holding the Board responsible for the sheriff's discrimination. For the foregoing reasons, the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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